

4th Cir.: Walgreens' misrepresentations of Medicaid eligibility may be material

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In late 2021, a district court¹ dismissed an FCA suit filed by the U.S. and Virginia where the governments pursued a surprising theory (at least as to the federal government): that Walgreens made material misrepresentations regarding whether patients met state Medicaid eligibility requirements that the federal Centers for Medicare and Medicaid Services (CMS) *itself* had said were illegal.

The court concluded that while the fraudulent statements did influence the state's decision to pay the Medicaid claims, they *should not have* influenced the decision-making because the drugs should have been covered regardless of the information in the falsified records.

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requirements violated federal law.*

As a result, the court concluded that the misrepresentations were not material under *Escobar*² and the case was dismissed. The governments appealed and the Fourth Circuit reversed in August.³

The case stemmed from the discovery that a Walgreens employee was falsifying Medicaid patient records and other documents to establish that the patients satisfied Virginia's eligibility requirements for direct-acting antiviral drugs. Virginia required Medicaid patients to have a certain fibrosis score and have abstained from drugs and alcohol for a period to be covered.

According to the complaint, because of the alleged misrepresentations, Virginia's Medicaid department approved coverage for the drugs and reimbursed Walgreens for nearly \$800,000. The U.S. and Virginia sued Walgreens under the federal FCA and the Virginia Fraud Against Taxpayers Act to recover the funds.

The dispute turned on the question of materiality. Walgreens argued that the misrepresentations its employee made were not material because Virginia's eligibility requirements violated federal law.

Walgreens referred to guidance from CMS that advised state Medicaid programs that if they opted to cover prescription drugs, they were required to comply with certain sections of the Social Security Act that only allow coverage to be excluded in certain limited circumstances (not applicable here) and expressed concern with the conditions some states were imposing on access to direct-acting antiviral drugs. The guidance warned that eligibility conditions, like those in Virginia, had to satisfy the Social Security Act and could not unreasonably restrict coverage.

The Fourth Circuit vacated the dismissal, but declined to address the "daunting question" of whether Virginia's eligibility requirements violated the Social Security Act, reasoning that this does not control materiality as a matter of law. Rather, it looked to *Escobar* and the text of the FCA and concluded that taking the allegations as true, the misrepresentations *did* influence the state decision-makers.

The court held that the district court's suggestion that the government also needed to allege that the falsified representations "*should ... have* so influenced the decision-making" was off base and more than is required.

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The court also noted that the CMS guidance on which Walgreens relied was published 11 months *after* the fraudulent scheme had begun and thus questioned the district court's conclusion that the decisionmakers should have paid out the claims regardless of whether the patients met the eligibility criteria because Walgreens did not have the benefit of the guidance during those 11 months.

And finally, the court reasoned that the act of falsifying records to feign compliance with requirements suggests that Walgreens itself thought the requirements were material.

At the same time, since it viewed the legality of Virginia’s requirements as “fairly debatable,” the court acknowledged that whether they were in fact illegal could be relevant to whether the misrepresentation influenced the decisionmakers, but it was not dispositive. And it left open the question of “whether a misrepresentation can be material when it goes to a requirement that’s so blatantly illegal that no reasonable decisionmaker could be influenced by it.”

The Fourth Circuit also identified three other bases for its decision vacating the dismissal. First, as a policy matter, allowing Walgreens to avoid liability by challenging Virginia’s eligibility criteria once it was caught “would hinder the Act’s purpose of holding fraudsters accountable.” Second, the fact that the governments were the original plaintiffs was a strong indicator of materiality. Third, at least one of the alleged misrepresentations had nothing to do with the eligibility requirements and could establish an FCA claim.

On a procedural note, the appeals court also agreed with the governments’ argument that Walgreens could not avoid liability by what it viewed as a collateral challenge to the legality of the eligibility requirements.

It cited *United States v. Kapp*,⁴ and its progeny, for the proposition that “criminal-fraud defendants can’t escape liability by arguing that their fraudulent statements went to illegal requirements” and rejected an argument from Walgreens and amici from the

Chamber of Commerce, American Medical Association, and Medical Society of Virginia⁵ that *Kapp* and other criminal cases cited by the governments should not be applied in the FCA context.

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The Fourth Circuit vacated the district court’s dismissal order based on materiality and remanded to the district court.

Notes

¹ <https://bit.ly/3P9t0E6>

² <https://bit.ly/3LkuVV5>

³ *United States v. Walgreen Co.*, No. 22-1491 (4th Cir. Aug. 15, 2023), <https://bit.ly/45SGFGL>.

⁴ 302 U.S. 214 (1937).

⁵ Note that Arnold & Porter appellate attorneys represent the Chamber of Commerce, American Medical Association, and Medical Society of Virginia amici.

About the authors



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